

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

WILLIAM S. GABRYLUK,

Plaintiff,

vs

1:07-CV-1091

U.S. ARMY CHIEF, Office of Promotions,
Reserve Components; and DOYLE WILSON,
(or successor), Chief, Special Actions Section,
Reserve Components,

Defendants.

APPEARANCES:

WILLIAM S. GABRYLUK

Plaintiff, Pro Se

90 Vista Drive

Saratoga Springs, NY 12866

HON. GLENN T. SUDDABY

United States Attorney for the

Northern District of New York

Attorney for Defendants

445 Broadway

218 James T. Foley U.S. Courthouse

Albany, NY 12207-2924

DAVID N. HURD

United States District Judge

OF COUNSEL:

BARBARA D. COTTRELL, ESQ.

Assistant U.S. Attorney

ORDER

On October 16, 2007, the plaintiff, a retired commissioned officer in the United States Army Reserve, filed a complaint claiming he was wrongfully passed over or non-selected for promotion in 1993 and 1994 because of improper promotion selection instructions that established unconstitutional race and gender criteria. (Docket No. 1). He seeks monetary and equitable relief.

Defendants moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) on the grounds that this court lacks subject matter jurisdiction, and/or plaintiff fails to state a claim under Fed. R. Civ. P. 12(b)(6). (Docket No. 10). Plaintiff filed a letter in opposition and indicated a possible waiver of his claims for monetary damages. (Docket No. 11). The defendants did not reply.

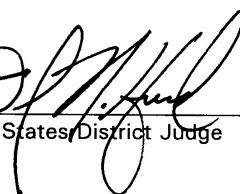
The submissions have all been reviewed. The facts in plaintiff's complaint and his letter are accepted as true for the purpose of this motion. Based upon the law,¹ there is no choice but to dismiss the complaint because this court does, in fact, lack jurisdiction over the subject matter of plaintiff's complaint. This decision is not based upon the merits of plaintiff's claim. Unless unconstitutional, the law must be followed, whether or not one agrees with it. The law applicable to this case is not unconstitutional.

Therefore, it is

ORDERED that the complaint is DISMISSED, without costs.

The District Clerk is directed to enter judgment accordingly. An appeal to the Second Circuit Court of Appeals pursuant to Rule 3 of the Fed. R. App. P. must be filed with the District Clerk within thirty (30) days after the judgment is entered. Rule 4, Fed. R. App. P.

IT IS SO ORDERED.



United States District Judge

Dated: May 29, 2008
Utica, New York.

¹ The defendants' Memorandum of Law is found at Docket No. 10-3.